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THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BALBOA CAPITAL CORPORATION,
a California corporation,

Plaintiff,

vs.

OLEG AZIZOV, an individual,

Defendant.

Case No.: 8:24-cv-01125-PA-PVC

[Assigned to the Hon. Percy Anderson]

**BALBOA CAPITAL
CORPORATION'S MOTION FOR
DEFAULT JUDGMENT AGAINST
DEFENDANT OLEG AZIZOV**

Complaint Filed: May 28, 2024
SAC Filed: June 17, 2024

1 TO THE COURT, ALL PARTIES, AND ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 23, 2024, at 1:30 p.m., or as
3 soon thereafter as the matter may be heard, in Courtroom 9A of the First Street
4 Courthouse, located at 350 W. 1st Street, Los Angeles, California 90012, the
5 Honorable Percy Anderson presiding, plaintiff Balboa Capital Corporation, a
6 California corporation (“Plaintiff” or “Balboa”) will, and hereby does, apply for an
7 entry of default judgment pursuant to Federal Rules of Civil Procedure Rule 55 and
8 Local Rules 55-1, 55-2, and 55-3, against Defendant Oleg Azizov, an individual
9 (“Azizov” or “Defendant”), for a judgment amount of **\$158,619.77**.

10 PLEASE TAKE FURTHER NOTICE that Balboa seeks a default judgment
11 against Defendants in the total amount of \$158,619.77, as Balboa has established
12 (a) a sum certain due and owing by Defendant Azizov to Balboa pursuant to the
13 Equipment Financing Agreement and Personal Guaranty entered into by Azizov
14 and Balboa; (b) that Defendant Azizov is not in military service and is neither a
15 minor or incompetent person; and (c) costs and attorneys’ fees are properly
16 awardable.

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1 PLEASE TAKE FURTHER NOTICE that this motion is based on this
2 Notice of Motion, the supporting Memorandum of Points and Authorities, the
3 supporting declarations of Jared T. Densen and Don Ngo, and the exhibits attached
4 thereto, the pleadings and papers filed in this action, and upon such further briefing,
5 authorities, and argument submitted to the Court prior to, or during, the hearing on
6 this matter.

7
8 DATED: August 22, 2024

SALISIAN | LEE LLP

9
10 By: 

Jared T. Densen

11 Neal S. Salisian

12 Brian C. Zhang

13 Attorneys for Plaintiff

14 BALBOA CAPITAL CORPORATION
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TABLE OF CONTENTS

I. INTRODUCTION AND RELEVANT FACTS.....	1
II. LEGAL ARGUMENT.....	3
A. Plaintiff Will Be Highly Prejudiced If Its Default Judgment Application Is Denied.	4
B. Plaintiff Has A High Likelihood Of Success On The Merits Of Its Substantive Claims And Its Complaint Is Sufficiently Pled.....	6
C. The Sum Of Money At Stake Favors An Entry Of A Default Judgment.	8
D. There Are No Material Facts That Are Reasonably In Dispute.....	9
E. Defendants’ Defaults Are Not The Result Of Excusable Neglect.	10
F. Policy Concerns Favor Default Judgment In This Matter.	12
G. Plaintiff Has Proven Its Damages.	12
III. CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Acoustics, Inc. v. Trepte Constr. Co.,</i>	
14 Cal. App. 3d 887, 916 (1971).....	6
<i>Draper v. Coombs,</i>	
792 F.2d 915, 924 (9th Cir. 1986).....	10
<i>Educational Serv., Inc. v. Florida State Board for Higher Education,</i>	
710 F.2d 170, 176 (4th Cir. 1983).....	10, 11
<i>Eitel v. McCool,</i>	
782 F.2d 1470, 1471-72 (9th Cir. 1986).....	4, 8, 10
<i>Geddes v. United Fin. Group,</i>	
559 F.2d 557, 560 (9th Cir. 1977).....	6, 9
<i>Landstar Ranger, Inc. v. Parth Enters, Inc.,</i>	
725 F.Supp.2d 916, 921 (C.D. Cal. 2010).....	9
<i>McKnight v. Webster,</i>	
499 F.Supp.420, 424 (E.D. PA 1980)	11
<i>NewGen, LLC v. Safe Cig, LLC,</i>	
804 F.3d 606, 616 (9th Cir. 2016)	10, 11
<i>O'Connor v. State of Nevada,</i>	
27 F.3d 357, 364 (9th Cir. 1994).....	10
<i>Pena v. Seguros La Comercial, S.A.,</i>	
770 F.2d 811, 814 (9th Cir. 1985).....	12
<i>Penpower Tech, Ltd.,</i>	
627 F.Supp.2d at 1093	8, 12
<i>PepsiCo, Inc. v. Cal. Sec. Cans,</i>	
238 F.Supp.2d 1172, 1177 (C.D. Cal. 2002).....	4, 5, 6
<i>Reichert v. Gen. Ins. Co.,</i>	
68 Cal. 2d 822, 830 (1968).....	6

1	<i>Shanghai Automation Instrument Co. Ltd. v. Kuei,</i>	
2	194 F.Supp.2d 995, 1005 (N.D. Cal. 2001)	11
3	<i>Walters v. Statewide Concrete Barrier, Inc.,</i>	
4	No. C 04-2559 JSW, 2006 WL 2527776, at *4 (N.D. Cal. Aug. 30, 2006)	8
5	<u>STATUTES</u>	
6	Civ. Code §§ 1620, 3300	6
7	Fed. R. Civ. P. 55	3
8	RESTATEMENT 2d. CONTRACTS § 235(2)	6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELEVANT FACTS

Plaintiff Balboa Capital Corporation, a California corporation (“Plaintiff” or “Balboa”) submits the instant Motion for Default Judgment against Defendant Oleg Azizov, an individual (“Azizov” or “Defendant”)¹.

a. The Equipment Financing Agreement.

This action involves a claim for damages by Balboa against defendant Azizov for breach of the Equipment Financing Agreement No. 405807-000 (the “EFA”), and corresponding personal guaranty. [See Declaration of Don Ngo (“Ngo Decl.”), ¶3, Exh. A.]

Specifically, Balboa, on the one hand, and 703 Bakery and Azizov, on the other, entered into the EFA on or about June 10, 2022. [See *id.*] Under the terms of the EFA, Balboa loaned to 703 Bakery the sum of \$150,763.98, in order to finance equipment for its business (the “Collateral”). [See *id.*]

Concurrent with the execution of the EFA, and in order to induce Balboa to enter into the EFA with 703 Bakery, Azizov personally guaranteed, in writing, the payment of the then-existing and future indebtedness due and owing to Balboa under the terms of the EFA (the “Guaranty”). [See *id.*, ¶4.] Balboa relied on such Guaranty to finance the Collateral for 703 Bakery’s business. [See *id.*, Exh. B.]

Under the EFA, 703 Bakery was required to make twenty (20) quarterly payments of \$11,039.11, payable on the 1st day of each three-month period beginning September 1, 2022. [See *id.*, ¶5.] The last payment received by Balboa was credited toward the payment due for December 1, 2023. [See *id.*, Exh. C.] Therefore, on or about March 1, 2024, 703 Bakery breached the EFA, and Azizov

¹ As to the instant Motion, Balboa is only seeking default as to defendant Azizov, as 703 Bakery Corp. (“703 Bakery”) filed a Chapter 11 Bankruptcy prior to this action, and thus Balboa dismissed 703 Bakery with the filing of the Second Amended Complaint. [See Dkt. 13.]

1 breached the Guaranty, by failing to make the monthly payment due on that date,
2 and thus, both have remained continuously in default

3 At the time of Defendants' default there remained fourteen (14) quarterly
4 payments, for a total of \$154,547.54, due to Balboa. [*See id.*, ¶6, Exh. C.]

5 Following Defendant's default, Defendant made one full quarterly payment
6 of \$11,039.11 which Balboa credited for the payment due on March 1, 2024. [*See*
7 *id.*, ¶7.] Defendants have since failed to make further payments. [*See id.*] Thus,
8 **\$143,508.44** remains owed to Balboa. [*See id.*]

9 In addition, based on the amount due of \$143,508.44, Balboa is entitled to
10 prejudgment interest at the statutory rate of ten percent (10%) per annum, from
11 March 1, 2024 (the date of breach), to September 23, 2024 (the hearing date noticed
12 on this Motion), for a total interest amount of **\$8,137.17**, accruing at a rate of
13 **\$39.31 per day**, until the entry of judgment. [*See id.*; *see also* Declaration of Jared
14 T. Densen ("Densen Decl."), ¶¶5-6.]

15 **b. Attorneys' Fees and Costs.**

16 Pursuant to Paragraph 20 of the EFA, Balboa is entitled to recover its
17 attorneys' fees and costs from Defendant. [*See* Ngo Decl., ¶3, Exh. A.] Balboa has
18 incurred **\$504.00**, in recoverable costs. [*See* Densen Decl., ¶7, Exh. E.] The
19 amount of reasonable attorneys' fees is fixed by Local Rule 55-3, in the sum of
20 **\$6,470.16**. [*See id.*, ¶7.]

21 **c. Motion for Default Judgment.**

22 Balboa's Motion for Default Judgment satisfies the procedural requirements
23 of Local Rule 55-1 and 55-2, and Federal Rule of Civil Procedure 55(b). Balboa
24 filed its Complaint and case-initiating documents on May 28, 2024. [*See* Dkts. 1-
25 4.] Balboa subsequently filed its Second Amended Complaint and amended case-
26 initiating documents on June 17, 2024. [*See* Dkts. 13-16.] Defendant Azizov was
27 properly served on July 2, 2024, pursuant to Federal Rule of Civil Procedure 4.
28 [*See* Dkt. 18.] On July 30, 2024 Balboa filed its Request for Clerk to Enter Default

1 against Azizov (“Default Entry Request”), and the Clerk of the Court entered the
2 default against Azizov on July 31, 2024. [See Dkts. 20-21.]

3 Defendant Azizov is not a minor, incompetent person, or a person in military
4 service or otherwise exempted from default judgment under the Servicemembers
5 Relief Act of 1940 (“SCRA”). [See Densen Decl., ¶4, Exh. D.]

6 Moreover, this Court has subject matter jurisdiction over the instant action.
7 The amount in controversy, as alleged in the Complaint and as set forth herein,
8 exceeds \$75,000. [See Dkt. 1; *see also* Densen Decl., ¶9.] Plaintiff Balboa was and
9 still operates as a California corporation, with its principal place of business in
10 Orange County, California. [See Dkt. 1, ¶1.] Balboa is also now a wholly owned
11 subsidiary of Ameris Bank, and operating as a division of Ameris Bank, a Georgia
12 state-chartered banking corporation, and accordingly, Balboa is a citizen of the
13 State of California, as well as the State of Georgia, via its parent company, Ameris
14 Bank. [See *id.*]

15 Based upon my office’s research, and upon information and belief, defendant
16 Azizov is a citizen of the State of New York, including the Driver’s License Azizov
17 provided to Balboa which lists Azizov’s domicile as Brooklyn, NY 11229. [See *id.*,
18 ¶10.]

19 As set forth below, a default judgment should be entered against Defendant
20 Azizov since Balboa satisfies all seven factors under *Eitel*. Moreover, Balboa has
21 adequately proven its damages. Thus, Balboa respectfully requests that this Court
22 grant its request for a default judgment against Defendant Azizov in the amount of
23 **\$158,619.77.**

24 **II. LEGAL ARGUMENT**

25 “When a party against whom a judgment for affirmative relief is sought has
26 failed to plead or otherwise defend,” the Court may enter a judgment of default
27 upon Plaintiff’s application after an entry of default. *See* Fed. R. Civ. P. 55. Local
28

1 Rule 55 sets forth the procedural requirements that must be satisfied by a party
2 moving for a default judgment. Balboa's Motion has satisfied such requirements.

3 Here, Balboa filed its Complaint and case-initiating documents on May 28,
4 2024. [See Dkts. 1-4.] Balboa subsequently filed its Second Amended Complaint
5 and amended case-initiating documents on June 17, 2024. [See Dkts. 13-16.]
6 Defendant Azizov was properly served on July 2, 2024, pursuant to Federal Rule of
7 Civil Procedure 4. [See Dkt. 18.] On July 30, 2024 Balboa filed its Default Entry
8 Request, and the Clerk of the Court entered the default against Azizov on July 31,
9 2024. [See Dkts. 20-21.]

10 Defendant Azizov is not a minor, incompetent person, or a person in military
11 service or otherwise exempted from default judgment under the SCRA. [See
12 Densen Decl., ¶4, Exh. D.]

13 The Ninth Circuit follow the seven *Eitel* factors in deciding whether to enter
14 a default judgment:

15 (1) the possibility of prejudice to the plaintiff; (2) the merits
16 of plaintiff's substantive claim; (3) the sufficiency of the
17 complaint; (4) the sum of money at stake in the action; (5)
18 the possibility of a dispute concerning material facts; (6)
whether the default was due to excusable neglect; and (7)
the strong policy underlying the Federal Rules of Civil
Procedure favoring decisions on the merits.

19 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). A plaintiff need not
20 prove that all seven factors weigh in its favor, as courts *may* consider these factors
21 in their discretion on whether to enter a default judgment. *See id.*

22 Here, the underlying facts in this action show that all seven of the *Eitel*
23 factors weigh in Balboa's favor, and thus, supports the entry of default judgment.

24 **A. Plaintiff Will Be Highly Prejudiced If Its Motion for Default**
25 **Judgment Is Denied.**

26 A situation in which a plaintiff will be without any other recourse or recovery
27 should its default judgment application be denied qualifies as prejudice. *See*
28 *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

1 Here, Balboa has submitted its Motion for Default Judgment as a last resort
2 due to Defendant Azizov's deliberate unwillingness to accept responsibility for its
3 actions or even acknowledge Balboa's allegations.

4 The fact remains that Balboa, pursuant to the EFA, financed the Collateral
5 for 703 Bakery, with Defendant agreeing to make twenty (20) quarterly payments
6 of \$11,039.11, for which fourteen (14) quarterly payments, for a total of
7 \$154,547.54, still remain due to Balboa at the time of Defendant's default. [See
8 Ngo Decl., ¶¶5-6, Exh. C.] Following Defendant's default, Defendant made one
9 full quarterly payment of \$11,039.11 which Balboa credited for the payment due on
10 March 1, 2024. [See *id.*, ¶7.] Defendants have since failed to make further
11 payments. [See *id.*] Thus, **\$143,508.44** remains owed to Balboa. [See *id.*]

12 Balboa has made demands for its monies from Defendant under the
13 Guaranty, all of which Defendant Azizov has failed to pay back. [See *id.*, ¶8.]

14 Balboa filed its Complaint in this action to recover the monies owed on it,
15 but Defendant has been unwilling to participate in, or otherwise, acknowledge the
16 litigation. Balboa's Motion for Default Judgment is its final option for an attempt
17 at recovery against Defendant Azizov, and without the Court granting the default
18 judgment, Balboa will be prejudiced and be denied its right to a judicial resolution
19 of its presented claims against Defendant Azizov. *See PepsiCo*, 238 F.Supp.2d at
20 1177.

21 Moreover, if Balboa's Motion for Default Judgment is denied, it will suffer a
22 significant loss due to no fault of its own, and Defendant Azizov will obtain a
23 significant windfall of over \$143,508.44. Not only will the deliberate nonaction by
24 Defendant Azizov and her continued stalling techniques be unjustly rewarded, but
25 Balboa will effectively be penalized for its procedurally proper demands for the
26 return of its monies available through the court system's proper channels.

1 Balboa will be substantially prejudiced should its Motion for Default
2 Judgment be denied, and thus, further supports the Default Judgment against
3 Defendant Azizov to be granted by this Court.

4 **B. Plaintiff Has A High Likelihood Of Success On The Merits Of Its**
5 **Substantive Claims And Its Complaint Is Sufficiently Pled.**

6 “The general rule of law is that upon default[,] the factual allegations of the
7 complaint, except those relating to the amount of damages, will be taken as true.”
8 *See Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). Courts often
9 consider the second (merits of the claim) and third (sufficiency of the complaint)
10 factors under *Eitel* together. *See PepsiCo*, 238 F.Supp.2d at 1177.

11 The elements for a breach of contract are: (1) the existence of a contract, (2)
12 performance by the plaintiff of its obligations under the contract, (3) breach of the
13 contract by the Defendants, and (4) resulting damages proximately caused by the
14 Defendants’ breach of contract. *See Reichert v. Gen. Ins. Co.*, 68 Cal.2d 822, 830
15 (1968); *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal.App.3d 887, 916 (1971); *see*
16 *also* Civ. Code §§ 1620, 3300; and RESTATEMENT 2d. CONTRACTS § 235(2).

17 Here, all elements are met. Specifically, Balboa, on the one hand, and 703
18 Bakery and Azizov, on the other, entered into the EFA on or about June 10, 2022.
19 [See Ngo Decl., ¶3, Exh. A.] Under the terms of the EFA, Balboa loaned to 703
20 Bakery the sum of \$150,763.98, in order to finance the Collateral for its business.
21 [See *id.*]

22 Concurrent with the execution of the EFA, and in order to induce Balboa to
23 enter into the EFA with 703 Bakery, Azizov personally guaranteed, in writing, the
24 payment of the then-existing and future indebtedness due and owing to Balboa
25 under the terms of the EFA via the Guaranty. [See *id.*, ¶4, Exh. B.] Balboa relied
26 on such Guaranty to finance the Collateral for 703 Bakery’s business. [See *id.*]

27 Under the EFA, 703 Bakery was required to make twenty (20) quarterly
28 payments of \$11,039.11, payable on the 1st day of each three-month period

1 beginning on September 1, 2022. [*See id.*, ¶5, Exh. C.] The last payment received
2 by Balboa was credited toward the payment due for December 1, 2023. [*See id.*,
3 Exh. C.] Therefore, on or about March 1, 2024, 703 Bakery breached the EFA, and
4 Azizov breached the Guaranty, by failing to make the monthly payment due on that
5 date, and thus, both have remained continuously in default. [*See id.*]

6 At the time of Defendant's default there remained fourteen (14) quarterly
7 payment, for a total of \$154,547.54, due to Balboa. [*See id.*, ¶6, Exh. C.]

8 Following Defendant's default, Defendant made one full quarterly payment
9 of \$11,039.11 which Balboa credited for the payment due on March 1, 2024. [*See*
10 *id.*, ¶7.] Defendants have since failed to make further payments. [*See id.*] Thus,
11 **\$143,508.44** remains owed to Balboa. [*See id.*]

12 In addition, based on the amount due of \$143,508.44, Balboa is entitled to
13 prejudgment interest at the statutory rate of ten percent (10%) per annum, from
14 March 1, 2024 (the date of breach), to September 23, 2024 (the hearing date noticed
15 on this Motion), for a total interest amount of **\$8,137.17**, accruing at a rate of
16 **\$39.31 per day**, until the entry of judgment. [*See id.*; *see also* Densen Decl.), ¶¶5-
17 6.]

18 Pursuant to Paragraph 20 of the EFA, Balboa is entitled to recover its
19 attorneys' fees and costs from Defendant. [*See* Ngo Decl., ¶3, Exh. A.] Balboa has
20 incurred **\$504.00**, in recoverable costs. [*See* Densen Decl., ¶7, Exh. D.] The
21 amount of reasonable attorneys' fees is fixed by Local Rule 55-3, in the sum of
22 **\$6,470.16**. [*See id.*, ¶7.]

23 There is no doubt, and it cannot be disputed that: (1) Balboa and 703 Bakery
24 and Azizov entered into the EFA and Guaranty; (2) Azizov personally guaranteed,
25 in writing, the payment of the then-existing and future indebtedness due and owing
26 to Balboa under the terms of the EFA; (3) 703 Bakery received the loan in order to
27 finance the Collateral for its business; (4) 703 Bakery and Azizov ceased making
28 payments pursuant to the EFA and Guaranty; and (5) Balboa suffered and continues

1 to suffer damages due to 703 Bakery and Azizov's continued nonpayment. Thus,
2 Balboa has a substantially high likelihood in succeeding on the merits of its claims.
3 In fact, no known defenses exist to any of the material facts.

4 **C. The Sum Of Money At Stake Favors An Entry Of A Default**
5 **Judgment.**

6 As a general rule, courts factor the sum of money at stake on a case-by-case
7 basis, and in relation to the other factors influencing whether to enter default
8 judgment. *See Eitel*, 782 F.2d at 1472 (default judgment was denied where plaintiff
9 was seeking \$3 million in damages *and* the parties disputed material facts). This
10 requires the court to assess whether the recovery sought is proportional to the harm
11 caused by Defendants' conduct. *See Walters v. Statewide Concrete Barrier, Inc.*,
12 No. C 04-2559 JSW, 2006 WL 2527776, at *4 (N.D. Cal. Aug. 30, 2006) ("[i]f the
13 sum of money at issue is reasonably proportionate to the harm caused by the
14 Defendants' actions, then default judgment is warranted").

15 In *Penpower Tech, Ltd. v. S.P.C. Tech.*, 627 F.Supp.2d 1083 (N.D. Cal.
16 2008), despite reasoning that plaintiff's request for \$677,075.37 in treble damages,
17 \$500,000.00 in punitive damages, \$100,000.00 in statutory damages, attorneys'
18 fees of \$16,497.00, and costs of \$2,005.00, were "speculative" and weighed against
19 default judgment, the court nevertheless granted plaintiff's default judgment.

20 Here, Balboa seeks compensatory damages pursuant to the EFA in the
21 amount of **\$143,508.44**; prejudgment interest in the amount of **\$8,137.17** (from the
22 date of breach through the date Balboa's Motion has been noticed to be heard), plus
23 **\$39.31 per day** until the entry of judgment; statutory attorneys' fees, as fixed by
24 Local Rule 55-3, in the amount of **\$6,470.16**; and costs in the amount of **\$504.00**.
25 [See Densen Decl., ¶¶5-7, Exh. E.] The damages sought are contractually-based
26 and arise out of the clear terms and obligations of the EFA; the prejudgment interest
27 was calculated at the statutory rate of ten percent (10%) per annum; and the
28 attorneys' fees requested are fixed by Local Rule 55-3. [See *id.*]

1 As such, the sum of money sought is reasonable and far from speculative. It
2 is also substantially less than the \$3 million sought in *Eitel*, in which this sum, and
3 other factors, weighed in the favor of denying default judgment. And it is also
4 substantially less than the roughly \$1.3 million sought in *Penpower Tech*, in which
5 default judgment was granted, despite the sum of money being deemed
6 “speculative.”

7 Thus, the sum of money sought in this action weighs in the favor of granting
8 default judgment, especially in the light of the other seven *Eitel* factors, and due to
9 the certainty and reasonableness of the sum.

10 **D. There Are No Material Facts That Are Reasonably In Dispute.**

11 “The general rule of law is that upon default[,] the factual allegations of the
12 complaint, except those relating to the amount of damages, will be taken as true.”
13 *See Geddes, supra*, 559 F.2d at 560. Where a plaintiff’s complaint is well-pleaded
14 and the Defendants make no effort to properly respond, the likelihood of disputed
15 facts is very low. *See Landstar Ranger, Inc. v. Parth Enters, Inc.*, 725 F.Supp.2d
16 916, 921 (C.D. Cal. 2010).

17 As thoroughly detailed in Section II.B., *supra*, there are no material facts that
18 are reasonably in dispute. Balboa, on the one hand, and 703 Bakery and Azizov, on
19 the other, entered into the EFA on or about June 10, 2022. [See Ngo Decl., ¶3, Exh.
20 A.] Under the terms of the EFA, Balboa loaned to 703 Bakery the sum of
21 \$150,763.98, in order to finance the Collateral for its business. [See *id.*]

22 Concurrent with the execution of the EFA, and in order to induce Balboa to
23 enter into the EFA with 703 Bakery, Azizov personally guaranteed, in writing, the
24 payment of the then-existing and future indebtedness due and owing to Balboa
25 under the terms of the EFA via the Guaranty. [See *id.*, ¶4.] Balboa relied on such
26 Guaranty to finance the Collateral for 703 Bakery’s business. [See *id.*, Exh. B.]

27 Under the EFA, 703 Bakery was required to make twenty (20) quarterly
28 payments of \$11,039.11, payable on the 1st day of each three-month period

1 beginning on September 1, 2022. [See *id.*, ¶5.] The last payment received by
2 Balboa was credited toward the payment due for December 1, 2023. [See *id.*, Exh.
3 C.] Therefore, on or about March 1, 2024, 703 Bakery breached the EFA, and
4 Azizov breached the Guaranty, by failing to make the monthly payment due on that
5 date, and thus, both have remained continuously in default. [See *id.*]

6 At the time of Defendants' default there remained fourteen (14) quarterly
7 payment, for a total of \$154,547.54, due to Balboa. [See *id.*, ¶6, Exh. C.]

8 Following Defendant's default, Defendant made one full quarterly payment
9 of \$11,039.11 which Balboa credited for the payment due on March 1, 2024. [See
10 *id.*, ¶7.] Defendants have since failed to make further payments. [See *id.*] Thus,
11 **\$143,508.44** remains owed to Balboa. [See *id.*]

12 Defendant Azizov cannot dispute any of the facts in any way or make any
13 reasonable arguments surrounding any of the material facts in this action. If
14 anything, defendant Azizov's refusal to participate in, or even acknowledge the
15 litigation, is evidence that no such defense exists.

16 **E. Defendant's Default Is Not The Result Of Excusable Neglect.**

17 Excusable neglect is not found where a Defendants who was properly served
18 simply ignored the deadline to respond. *See NewGen, LLC v. Safe Cig, LLC*, 804
19 F.3d 606, 616 (9th Cir. 2016) (adding that Defendants' counsel contacting
20 plaintiff's counsel after default had been entered did not constitute to "excusable
21 neglect"). In fact, courts have required some showing of good faith by the
22 defaulted Defendants to constitute "excusable neglect." *See Eitel*, 782 F.2d at
23 1471-72 (Defendants' failure to answer was held to be excusable neglect in light of
24 ongoing settlement negotiations); *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir.
25 1986) (finding excusable neglect where Defendants filed an answer past the
26 deadline and on the same day that the motion for default judgment was filed);
27 *O'Connor v. State of Nevada*, 27 F.3d 357, 364 (9th Cir. 1994) (excusable neglect
28 was found where Defendants has good faith of a timely answer); *Educational Serv.*,

1 *Inc. v. Florida State Board for Higher Education*, 710 F.2d 170, 176 (4th Cir. 1983)
2 (excusable neglect found where Defendants had appeared in the action and opposed
3 a request for a preliminary injunction in which the party had set forth its defenses);
4 *McKnight v. Webster*, 499 F. Supp. 420, 424 (E.D. PA 1980) (excusable neglect
5 found where Defendants sought an extension of time to respond, but a default
6 judgment was sought in the interim).

7 Where the Defendants “were properly served with the Complaint, the notice
8 for the entry of default, as well as documents in support of the instant [default
9 judgment application],” favors this factor for the entry of default judgment. *See*
10 *Shanghai Automation Instrument Co. Ltd. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D.
11 Cal. 2001).

12 Here, Defendant Azizov failed to make any showing whatsoever that his
13 unwillingness to participate in the litigation stemmed from, or was in any way due
14 to, excusable neglect. Defendant Azizov was properly served by substituted service
15 at 1773 E 29th St, Brooklyn, NY 11229 upon Zoya Peysakhav as co-occupant.
16 [See Dkt. 18.] Defendant has not yet made any appearance in the action, and thus,
17 has not made any effort to answer, defend, or otherwise participate, in this action.

18 As detailed above, courts have found for excusable neglect only in cases in
19 which a Defendants makes good faith showing that the Defendants attempts to
20 participate in the litigation to address and defend the allegations set forth against the
21 Defendants. Declining to respond to a complaint after proper service (even in the
22 case where Defendants’ counsel contacts plaintiff’s counsel after the entry of
23 default), does not warrant a finding of excusable neglect. *See NewGen*, 804 F.3d at
24 616.

25 Here, Defendant Azizov has failed to acknowledge his wrongdoings and the
26 allegations he faces, even in the slightest degree. Instead, Defendant has blatantly
27 ignored Balboa’s Complaint and all other papers filed thereafter. Rather, Defendant
28

1 Azizov's course of action in response to Balboa's Complaint, or the apparent lack
2 thereof, is intentional, and thus, would not constitute excusable neglect.

3 **F. Policy Concerns Favor Default Judgment In This Matter.**

4 Although courts have expressed that as a general rule, policy favors decisions
5 on the merits, cases should be decided on its merits only when *reasonably possible*.
6 *See Pena v. Seguros La Comercia, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985)
7 (emphasis added). The policy preference to decide a case on its merits is not
8 dispositive, and thus, does not preclude a court from granting a default judgment.
9 *See Penpower Tech, Ltd.*, 627 F.Supp.2d at 1093 (Defendants' failure to respond to
10 a Complaint makes a case decision on its merits impractical, if not, impossible).

11 Here, even the policy concerns to decide a case on its merits favor Balboa to
12 grant Balboa's request for a default judgment. As detailed in II.E., *supra*,
13 Defendant has made it abundantly clear that they will not participate in this
14 litigation, or even acknowledge the instant action. Defendant has deliberately
15 chosen a course of action to simply ignore Balboa and its claims against them,
16 including their own liability. Thus, the Court's decision will not be based on the
17 merits of this case since there is no reasonable possibility at this point given
18 Defendant Azizov's refusal to participate in this litigation.

19 Moreover, policy concerns certainly do not weigh in favor of rewarding
20 Defendant for their unwillingness to account for their liability to Balboa, and the
21 extremely prejudicial windfall they would receive should their deliberate silence
22 and stalling techniques be rewarded, at Balboa's expense. *See* Section II.A., *supra*.

23 **G. Plaintiff Has Proven Its Damages.**

24 Under the EFA, 703 Bakery was required to make twenty (20) quarterly
25 payments of \$11,039.11, payable on the 1st day of each three-month period
26 beginning on September 1, 2022. [*See id.*, ¶5.] The last payment received by
27 Balboa was credited toward the payment due for December 1, 2023. [*See id.*, Exh.
28 C.] Therefore, on or about March 1, 2024, 703 Bakery breached the EFA, and

1 Azizov breached the Guaranty, by failing to make the monthly payment due on that
2 date, and thus, both have remained continuously in default. [See *id.*]

3 At the time of Defendant's default there remained fourteen (14) quarterly
4 payment, for a total of \$154,547.54, due to Balboa. [See *id.*, ¶6, Exh. C.]

5 Following Defendant's default, Defendant made one full quarterly payment
6 of \$11,039.11 which Balboa credited for the payment due on March 1, 2024. [See
7 *id.*, ¶7.] Defendants have since failed to make further payments. [See *id.*] Thus,
8 **\$143,508.44** remains owed to Balboa. [See *id.*]

9 In addition, based on the amount due of \$143,508.44, Balboa is entitled to
10 prejudgment interest at the statutory rate of ten percent (10%) per annum, from
11 March 1, 2024 (the date of breach), to September 23, 2024 (the hearing date noticed
12 on this Motion), for a total interest amount of **\$8,137.17**, accruing at a rate of
13 **\$39.31 per day**, until the entry of judgment. [See *id.*; see also Densen Decl., ¶¶5-
14 6.]

15 Pursuant to Paragraph 20 of the EFA, Balboa is entitled to recover its
16 attorneys' fees and costs from Defendant. [See Ngo Decl., ¶3, Exh. A.] Balboa has
17 incurred **\$504.00**, in recoverable costs. [See Densen Decl., ¶7, Exh. E.] The
18 amount of reasonable attorneys' fees is fixed by Local Rule 55-3, in the sum of
19 **\$6,470.16**. [See *id.*, ¶7.]

20 Altogether, this totals out to **\$158,619.77** (as of September 23, 2024),
21 calculated as follows:

22	- Amount owed:	\$143,508.44
23	- Prejudgment Interest:	\$ 8,137.17
24	- Attorneys' Fees:	\$ 6,470.16
25	- Recoverable Costs:	\$ 504.00
26	- <u>Total</u>	<u>\$158,619.77</u>

1 **III. CONCLUSION**

2 Based on Balboa's Complaint, Motion for Default Judgment, and all
3 supporting papers, Balboa respectfully requests that the Court grant its Motion for
4 Default Judgment against Defendant Azizov, in the total amount of **\$158,619.77**.

5
6 DATED: August 22, 2024

SALISIAN | LEE LLP

7
8 By:  _____

Jared T. Densen

9 Neal S. Salisian

10 Brian C. Zhang

11 Attorneys for Plaintiff
12 AMERIS BANK d/b/a BALBOA CAPITAL
13 CORPORATION
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